IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-393

WILLIAM LOUIS PIERCEALL
Petitioner

v.

COMMONWEALTH OF VIRGINIA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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William L. Pierceall, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia entered in this case on April 21, 1978, and the denial of a rehearing as to that judgment on June 9, 1978.

OPINION BELOW

The opinion of the Supreme Court of Virginia and the transcript of the oral ruling of the Trial Court is contained in the Appendix. The written opinion of the Supreme Court of Virginia is reported at —— Va. ——, 243 S.E. 2d 222 (April 21, 1978).

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on April 21, 1978 and the Petition for Rehearing thereto was denied on June 9, 1978. (5a, 17a) The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The conviction of the petitioner was obtained with evidence admitted in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED

I. Were The Fruits Of The Search Conducted On April 19, 1976, Seized Pursuant To A Warrant Issued Without Probable Cause And Admitted Into Evidence Contrary To The Fourth And Fourteenth Amendments?

A. Does the informant's tip upon which probable cause purports to rest conform to the *Aguilar-Spinelli* test?

B. Has the conflict between *Harris* v. *U.S.* and *Spinelli* v. *U.S.* as to the use of criminal reputation allegations created confusion and conflict in State and lower Federal Courts and did the Court below properly give weight to such allegations?

CONSTITUTIONAL PROVISIONS

The Fourth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

Indictments were returned against Mr. William L. Pierceall on August 2, 1976 for five different drug-related offenses in Prince William County, Virginia.

All these offenses were alleged to have occurred on April 19, 1976 and were the result of a raid conducted by the Prince William County Police Department at the premises allegedly occupied by the defendant on that date. He was charged in Indictment No. 6480 with possession of hashish. He was charged in Indictment No. 6381 with manufacturing or producing marijuana. He was charged in Indictment No. 6482 with possessing amphetamine with intent to distribute. He was charged in Indictment No. 6483 with possessing marijuana with intent to distribute. He was charged in Indictment No. 6484 with possession of cocaine. (A. 1-5)[1]

On July 8, 1976, the Honorable James Keith, of the Circuit Court of Prince William County, Virginia, sitting without a jury, overruled Mr. Pierceall's Motion to Suppress the fruits of the execution of the search warrant on April 19, 1976, and after admitting said fruits into evidence, found him guilty of the charges contained in Indictments 6481 through 6484. Indictment No. 6480 was dismissed by the Court. (A. 24-25, 36-38, 1a-2a)

On January 11, 1977, the Trial Court heard Mr. Pierceall's motion for a new trial which it took under advisement and subsequently denied by letter opinion dated January 13, 1977. (A. 34-35)

On January 27, 1977 the Trial Court sentenced Mr. Pierceall to serve fifteen years in the State penitentiary, with ten years of said sentence to be suspended upon Mr. Pierceall's good behavior for that period of time. He received the identical sentence as to each indictment and the sentence was to run concurrently

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[1] A. refers to the Appendix in the Virginia Supreme Court.

as to each indictment. The Trial Court entered the orders sentencing Mr. Pierceall on January 27, 1977. (A. 36-47) Appeal to the Supreme Court of Virginia from the orders entered on January 27, 1977 was duly noted. (A. 48-51) The Supreme Court of Virginia granted a Writ of Error to Mr. Pierceall on October 11, 1977. The Writ of Error was limited to the question of the sufficiency of the search warrant affidavit. (3a) On April 21, 1978 the Supreme Court of Virginia upheld the ruling of the Trial Court and filed an opinion which is set forth in the Appendix. (6a-16a) On June 9, 1978 the Virginia Supreme Court denied Mr. Pierceall's Petition for a Rehearing. (17a)

STATEMENT OF FACTS

On April 19, 1976, at approximately 11:45 P.M., the Prince William County Police executed a search warrant at 13401 Kingsman Road, Woodbridge, Prince William County, Virginia. The police arrested the Appellant on the premises and seized certain suspected drugs and paraphenalia which were the basis for the charges brought against the Appellant and his subsequent conviction of same. (A. 26-32)

The warrant was issued based on a sworn Affidavit of Investigator R. L. Bennett, which reads as follows:

AFFIDAVIT FOR SEARCH WARRANT

I, INVESTIGATOR R. L. BENNETT OF THE INTELLIGENCE BUREAU, PRINCE WILLIAM COUNTY VIRGINIA POLICE DEPARTMENT, DO HEREBY SWEAR AND AFFIRM THAT THE INFORMATION CONTAINED IN THIS AFFIDAVIT FOR SEARCH WARRANT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

During the fall of 1972 I received unconfirmed information from various informants regarding one

WILLIAM PIERCEALL who was and is the owner/operator of the Dale City Sunoco (service station) at 3125 Davis Ford Road, Woodbridge, Virginia. The information given me was that PIERCEALL was trafficking in marijuana and other drugs. That is to say that PIERCEALL buys illicit controlled substances, marijuana and other drugs, for a price and then re-sells the material at a substantial profit. This information could not be confirmed at that time.

On July 23, 1973, Investigator C. T. Deane, also of the Prince William County police department, told me that on July 19, 1973, he had arrested two persons, MICHAEL STEVEN JENKINS and ROGER ALLEN HURT, charging them with a burglary of the Dale City Sunoco Service Station (owned by subject PIERCEALL) on July 12, 1973. Investigator Deane told me that both had confessed to this crime after having been advised of their rights, and that MICHAEL STEVEN JENKINS told him that during the time that he (JENKINS) had worked for PIERCEALL, he (JENKINS) had seen a case placed in the office area of the station by PIERCEALL which contained two (2) wrapped kilos (1 Kilo=2.2 lbs.) of marijuana. JENKINS told Investigator Deane that PIERCEALL had left the bag at the station that night and had telephoned him (JENKINS) to see if it was still there. JENKINS indicated that he was a user of marijuana and therefore could recognize same.

Investigator Deane told me that subject ROGER ALLEN HURT had been interviewed separately from subject JENKINS and that HURT stated that he also had seen two kilos of marijuana which had alleged belonged to PIERCEALL. At that time HURT was also an employee of WILLIAM PIERCEALL at the Dale City Sunoco Service Station.

Investigator Deane also told me that JENKINS had told him that one WILLIAM "BILLY" WOOTEN at the Dale City Sunoco service station was "selling marijuana for PIERCEALL". WILLIAM "BILLY"

WOOTEN is personally known to this investigator. He has the general reputation of a drug user and dealer in various drugs and marijuana.

On July 25, 1973, Officer W. P. Metheny of the Prince William County Police Department who at that time was working undercover, purchased a quantity of cocaine from KIPPY EUGENE ROGERS, an employee of WILLIAM LOUIS PIERCEALL at the Dale City Sunoco Service Station. On July 31, 1973 Officer Metheny purchased a quantity of methampethamine from subject ROGERS. Both these sales took place in a house approximately 75 yards from the Dale City Sunoco Service Station, which was rented by ROGERS and others. ROGERS was subsequently arrested, tried and convicted on these two felonies. Another resident of the house occupied by KIPPY EUGENE ROGERS during this period of time was ROGER ALLEN HURT. Both ROGERS and HURT were employed by PIERCEALL at the Dale City Sunoco Service Station.

I have learned that on August 29, 1973, WILLIAM LOUIS PIERCEALL was arrested in Toronto, Ontario, Canada in the company of KIPPY EUGENE ROGERS and two other men all of whom were charged with possession of restricted weapons (three (3) loaded handguns), possession or narcotics (cocaine) and conspiracy. Investigators of the Metropolitan Toronto Police questioned these men and learned that PIERCEALL was involved in an unknown business transaction with a man named ARTHUR ISRAEL and that ISRAEL had absconded with $3,000.00. PIERCEALL had gone to Toronto on August 26, 1973 and located ISRAEL in that city. PIERCEALL then returned to Virginia where he hired KIPPY EUGENE ROGERS and two (2) other men to return to Toronto, find ISRAEL and "work him over" until he returned the $3,000. ROGERS and the other men were to be paid $200.00 each for their services. The Metropolitan Toronto Police Department believed that the four men actually planned to murder subject

ISRAEL and further believed that the $3,000.00 ISRAEL absconded with was a drug "rip-off".

It may be noted that WILLIAM LOUIS PIERCEALL, aka: "BILL" PIERCEALL has been seen often in the company of known and suspected drug users and dealers in this community. A goodly portion of his associates are active in the illicit drug scene, and several have lived at PIERCEALL's house at 13401 Kingsman Road, Woodbridge, Virginia, Prince William County for various lengths of time.

In November 1975, I developed an informant who gave me additional information concerning WILLIAM LOUIS PIERCEALL. This informant desires to remain anonymous as he fears for his safety should his identity be made known. The informant stated that PIERCEALL "had a gun and would use it" on him (the informant).

The informant agreed to make a 'controlled buy' of marijuana from "BILL" PIERCEALL at PIERCEALL's house at 13401 Kingsman Road, Woodbridge, Virginia on or about November 15, 1975.

I met the informant at a pre-designated location at approximately 5:15 p.m. At this time I searched the informant and his/her car and thus assured myself that there was no marijuana or other controlled substances present. In addition, I removed the informant's personal money. I then furnished the informant $35.00.

At 5:30 p.m. the informant departed enroute to 13401 Kingsman Road (BILL PIERCEALL's house), and I followed in my car, observing the informant.

I observed the informant arrive and enter 13401 Kingsman Road at 5:44 p.m.

At 6:01 p.m. the informant was seen to exit 13401 Kingsman Road.

I then followed the informant back to a pre-designated meeting place where the informant turned

over a plastic bag of marijuana to me which the informant stated had been purchased from "BILL" PIERCEALL for $35.00. Subsequent chemical analysis of the material purchased on this date conducted by a chemist at the Bureau of Forensic Science (State laboratory) revealed the material to be in fact, marijuana.

The informant also stated that approximately one (1) pound of marijuana was then within PIERCEALL's house, along with "at least 50 marijuana plants" which were being grown by BILL PIERCEALL in one bedroom in the lower portion of the house (13401 Kingsman Road, Woodbridge, Virginia).

In early April 1976, I received additional information from the informant regarding WILLIAM LOUIS PIERCEALL to the effect that PIERCEALL had recently been "getting some white crosses in" NOTE: White Cross is a jargon term on (sic) the drug culture which refers to a type of small pill of amphetamine and/or methamphetamine which has a scored mark in the shape of a cross on X on (sic) one side. They are also called "cartwheels" and "speed". "Speed" refers to any preparation of a stimulent nature.

I based my knowledge of current drug terms prices, appearance, etc., on the following facts:

I am now and have been a full time narcotics enforcement officer with four (4) years experience exclusively in narcotics enforcement and a total of 13 years in law enforcement. I have received specialized training in narcotics enforcement through the U.S. Department of Justice, Bureau of Narcotics Enforcement Officer's and have read various books, etc., on the subject as well as having completed a number of college level classes related to special enforcement.

I also maintain an informant system which allows me continuing contact with the street terms, prices etc., of various drugs and controlled substances.

I have received information regarding WILLIAM LOUIS PIERCEALL which leads me to believe that he is presently selling quantities of "white crosses".

Within the past 24 hour period, I have received information from the informant as follows: The informant told me that William "Bill" Pierceall presently has a large number of "white crosses" at his home at 13401 Kingsman Rd., Woodbridge, Va. as well as a quantity of marijuana, marijuana smoking pipes and other related paraphernalia of drug use. I believe the information received from this person to be reliable, as the informant has provided me with information on several occasions in the past which independent investigation has proven to be true and correct. For example, the informant on one occasion told me that a certain person was dealing in a particular type of drug at a given point in time. I had, through prior investigation, determined that this information was correct, unbeknownest to the informant. The informant has provided this type of information on several occasions. In addition, I am further inclined to believe the informant due to the "controlled buy" situation in November 1975.

On the evening of April 19, 1976 I observed William "Bill" Pierceall in the company of one Joseph Rowe at the Hardee's restaurant in the Glendale Shopping Center Woodbridge, Va. Joseph Rowe is a known drug user and is a convicted felon having been convicted in 1973 of 2 counts of sale of marijuana to Inv. D. L. Cahill of the Prince William County Police. He is presently known to be active in the drug scene.

I therefore believe that based on the information provided by the informant and the fact that I personally seen (sic) William "Bill" Pierceall in the

company of a known Drug dealer within the past 24 hours, that there is now concealed within the premises of 13401 Kingman Rd., Woodbridge, Va. Prince William County, a quantity of contraband controlled substances possessed in violation of existing law.

/s/ R. L. BENNETT, Investigator

Sworn and subscribed before me on this 19th day of April, 1976.

/s/ JAMES BURNS

Magistrate, for Prince William County, Va.

(A. 6-12)

REASONS FOR GRANTING THE WRIT

I. The Fruits Of The Search Conducted April 19, 1976 Were Seized Pursuant To A Warrant Issued Without Probable Cause And Admitted Into Evidence Contrary To The Fourth And Fourteenth Amendments.

A. The informant's tip upon which probable cause is alleged to rest does not comply with the *Aguilar-Spinelli* test.

The affidavit set forth above was the basis for the issuance of the search warrant which was executed at 13401 Kingsman Road, Woodbridge, Prince William County, Virginia on April 19, 1976 at approximately 11:45 p.m. The items seized as a result of that search were the basis of the Commonwealth's case and instrumental in the conviction of the appellant. The affidavit does not contain sufficient facts to constitute probable cause and support the issuance of a search warrant. The evidence seized as a result of the execution of the search warrant should have been suppressed. The Trial Court denied Mr. Pierceall's Motion to Suppress the evidence and erred in doing so. The Virginia Supreme Court erred in upholding the Trial Court. The affidavit is an obvious effort to obtain a warrant on a large volume of stale information coupled with idle rumor and speculation. The information up to and including the "controlled buy" on November 15, 1975 is too stale to support the warrant, assuming probable cause was established at that time. The search warrant herein was issued on April 19, 1976, which was more than five months after the "controlled buy" on November 15, 1975.

As stated in *Sgro* v. *United States*, 53 S.Ct. 1938 (1932), the law requires that the allegations be so closely related in time as to justify the finding of probable cause at the time of the issuance of the

warrant. All the cases decided prior to the present case, which are even remotely factually similar, have held delays much shorter the five months and four days herein involved to render the information too stale to provide probable cause. This Court in *Sgro,* supra, held information twenty one days old too stale to support the issuance of a warrant. In *Stovall* v. *Commonwealth,* 213 Va. 67, 189 S.E.2d 753 (1972) the Court below held information seventy two (72) days old to be to stale to justify an issuance of a warrant. See, *Schoeneman* v. *U.S.,* 317 F.2d 173 (D.C.Cir. 1963) (noting the apparent limit to be thirty days); *Terry* v. *State,* 123 Ga. App. 746, 182 S.E.2d 513 (Ga.Ct. App. 1971) (four months too long); Annotation at 100 A.L.R. 2d 525 (1965) (states seven weeks is the apparent limit). Also, See, *Ashley* v. *State,* 241 N.E.2d 264 (Ind. 1968) and *State* v. *Wiley,* 363 A 2d 739 (Me.1976) which indicate information relating to drugs is short lived because of their portable nature.

The Court below followed the authority above cited, including their own decision in *Stovall,* supra, and held that the allegations in the warrant up to and including November 15, 1975 were stale. The Court said:

> The affidavit in the instant case contained information about the defendant's alleged criminal behavior during 1972, 1973, and on or about November 15, 1975. The interval between these events and April 19, 1976, when the warrant was issued, is considerable longer than the interval in *Stovall.* This information, standing alone, is not sufficient to support a finding of probable cause on the date the warrant was issued. (12a)

The Court below went on to consider the remainder of the warrant to determine if these allegations constituted probable cause. It correctly stated the allegations must be judged by the test set forth in *Aguilar* v. *Texas,* 378 U.S. 108, 12 L.Ed.2d 823, 87 S.Ct. 1509 (1964) and *Spinelli* v. *U.S.,* 393 U.S. 410 21 L.Ed.2d 637, 89 S.Ct. 584 (1969). (13a) The Court correctly pinpointed the issue regarding the remaining allegations in the complaint as whether they describe, "some of the underlying circumstances necessary to enable the magistrate to judge the validity of the informant's conclusion that the narcotics were in Pierceall's home". (13a)

The Court below centered on the key issue of that case. Whether the informant's tip allegedly within twenty four hours of April 19, 1976, meets the *Aguilar-Spinelli* test. The Court properly stated that this determination is to be based upon a common sense reading of the warrant. *U.S.* v. *Ventresca,* 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965). The Court's opinion below then departed from its careful reading of the applicable precedents and all common sense by reaching the following conclusions as to the informant's conclusory statement:

> In the present case, however, the tip in early April and the last tip received shortly before the issuance of the warrant on April 19, 1976, were furnished by the same person who five (5) months previously had entered the defendant's residence, made the controlled buy, and observed a pound of marijuana and the growing marijuana plants. We believe it is reasonable to infer that the informants last tip, unlike the officers unsupported conclusory statement in *Stovall,* was based on personal observation. We conclude that the affidavit, taken as a whole, states sufficient underlying circumstances to support the magistrate's finding of probable cause. (16a)

The Virginia Supreme Court is obviously trying to stick a square peg in a round hole. It is obviously sheer speculation that the informant's information was gained by personal observation rather than rumor or some other improper method. As was stated in *U.S.* v. *Karathanos,* 531 F.2d 26 (2d Cir. 1976) *cert. den.* 96 S.Ct. 3221, at 531 F.2d 31-32:

> To infer that the informant reached his conclusion in a reliable manner .... rather than an unreliable manner ... would be to permit a warrant to issue on the basis of a degree of speculation proscribed by the *Aguilar-Spinelli* test.... An affidavit should not require the magistrate, or reviewing Court to use imagination to supply essential details critical to determining probable cause.

The informant in *Karathanos* lived on the premises to be searched and that Court did not have to infer a right of access to the premises on the flimsy basis invoked by the lower Court herein. *Karathanos* held the affidavit insufficient based on the reasoning cited above.

The reasoning of the Court below, that the informant's conclusion was the result of personal observation, requires an active utilization of the Court's imagination. This is the very type of reasoning the *Aguilar-Spinelli* test is meant to prevent, as stated in *Karathanos* above. The magistrate is to be presented with facts, not conclusion, upon which to base his decision as to probable cause. The determination of probable cause is to be made by the magistrate on the facts presented and not upon speculation as to the facts upon which the informant may have based his conclusion.

Not only is it impossible to infer from the affidavit that the informant's conclusion was reached as a result

of personal observation, rather than rumor or surmise, the affidavit, as a whole, negated that proposition. The affiant is an experienced and educated police officer who has specialized in the handling of narcotic cases. His training and education in this regard is extensive. The affidavit was drafted nine (9) years after the decision in *Spinelli.* It is inconceivable an experienced narcotics agent would not be aware of the requirements of the *Aguilar-Spinelli* test.

Investigator Bennett has shown his awareness of this requirement by the detail in his affidavit concerning the events of November 15, 1975. He clearly recites the personal observations of the informant and the circumstances under which the informant made his observations.

If Investigator Bennett had had an informant with knowledge based on his personal observations he would have recited these observations and the surrounding circumstances in the affidavit to comply with the law as he knew it to be. There is no assertion of personal observation by the informant because there was no personal observation by the informant. The affidavit taken as a whole does not support the inference that the informant based his conclusion upon personal observation. Any such inference is mere speculation. Such speculation is prohibited by the *Aguilar-Spinelli* test.

Even if an inference that the informant had based his conclusion on personal observation was permissible, his tip does not meet the *Aguilar-Spinelli* test. The whole thrust of that test is that the magistrate be provided sufficient facts and circumstances to determine whether the informant's conclusion is accurate. The affidavit in the present case gives the magistrate no

information to determine whether the informant's observation supports his conclusion.

There have been numerous cases in which the informant and/or the affiant clearly relied on personal observation for his conclusion, but the information was not sufficient to support the issuance of a warrant. In *Spinelli* the affidavit alleged the officers had observed the defendant for five (5) days, but the affidavit was insufficient. The magistrate must know both the means by which the facts and circumstances were obtained and the facts and circumstances upon which the informant's conclusions rest. The magistrate herein had no way of knowing what the informant had observed, if it is permissible to infer that the informant based his conclusion upon his own observation. Also, see, *Commonwealth* v. *Shaw,* 444 Pa. 110, 291 A.2d 897 (1971); *Terry* v. *State,* supra; *Berger* v. *Commonwealth,* 213 Va. 54, 189 S.E.2d 360 (1972).

The whole thrust of *Aguilar-Spinelli* is that the informant is not the final arbiter as to probable cause, whether his conclusions are based on personal observations, or some other source of information. Even if he based his information upon personal observation, it is still not possible to determine whether the conclusion is strictly speculation or surmise. It is impossible to determine the sufficiency of the informant's observation in the present case, if there were any such observations, because they were not set forth in the affidavit. The magistrate must make the determination as to whether they support his conclusion that there were drugs in the house. He could not do so in the present case.

The Virginia Supreme Court cites *Manley* v. *Commonwealth,* 211 Va. 146, 176 S.E.2d 309 (1970), *cert. den.* 403 U.S. 936, as authority that the personal observations of an informant can support the issuance of a warrant. The affidavit in that case reads as follows at 176 S.E.2d 309:

> The material facts constituting probable cause for issuance of the warrant. I have received information from a reliable informant who states that he was at the apartment of Melvin Lloyd Manley, 313 West 27th Street, this past week and he saw a large quantity of marijuana (a narcotic drug) in a chest in the front room and also some marijuana in a dresser drawer in the middle room. My informer also states that in the past months he has smoked marijuana in the apartment . . . and in the past months he has made two purchases of marijuana from Melvin Lloyd Manley.

It is clear that the observations of the informant in *Manley* were set forth so that the magistrate could determine whether the observations of the informant supported his conclusion. In the present case we have no such information. The affidavit in *Manley* lets the magistrate make the decision as to the validity of the conclusion that the drugs were in the location stated. This is what the law requires. That is not the situation in the present case.

In conclusion, it is obvious that the Virginia Supreme Court engaged in obvious speculations in reaching its conclusion. The authorities make it clear that the *Aguilar-Spinelli* test cannot be met by speculations. The Virginia Supreme Court has held that is the applicable test. The affidavit in the present case does not meet the *Aguilar-Spinelli* test as to its essential allegations. The Courts below erred in holding the evidence which resulted from the search was admissible and a writ of certiorari should be issued to correct the error.

B. The Court should grant Certiorari to resolve the conflict between *Harris* v. *United States* and *Spinelli* v. *United States* as to the use of allegations of criminal reputation because this conflict has resulted in confusion and conflicts among the state and lower level federal courts and the Court should hold that such evidence was improperly considered in the present case.

In the case at bar the affidavit contained some allegations, as fully set forth below, that an individual with whom the defendant was seen on the date the warrant was issued was "a known drug user" and "is presently known to be active in the drug scene." This Court has directly dealt with this type of reputation allegations in two cases. *United States* v. *Spinelli,* 393 U.S. 410, 21 L.Ed.2d 637, 39 S.Ct. 584 (1969) clearly holds these allegations should not be considered in a determination of probable cause. In *United States* v. *Harris,* 403 U.S. 573, 29 L.Ed.2d 273, 91 S.Ct. 2075 (1971) a portion of the Court's opinion expresses the view of three (3) members of the Court to the contrary. This situation has led to confusion among other court's reading these decisions and to conflicting results among these courts. The Virginia Supreme Court below improperly gave weight to such statements and this Court should grant Certiorari to correct the injustice to this defendant and clear up the conflicts and confusion created by the conflict between *Spinelli* and *Harris.*

The statement referred to in the present case is as follows:

> On the evening of April 19, 1976, I observed William "Bill" Pierceall in the company of one Joseph Rowe at the Hardee's Restaurant in the Glendale Shopping Center, Woodbridge, Va. Joseph Rowe is a known drug user and is a convicted felon having been convicted in 1973 of two (2) counts of sale of marijuana to Inv. D. L. Cahill of the Prince William County Police. He is presently known to be active in the drug scene. (11a)

The Court below gave probative value to this statement in determining whether the affidavit met the first requirement of the *Aguilar-Spinelli* test. (15a).

This statement is indistinguishable from that contained in the affidavit considered in *Spinelli* as set forth at 393 U.S. 414 as follows:

> The application stated that "William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

This Court said concerning the above statement at 393 U.S. 414, the following:

> Finally, the allegations that Spinelli was "known" to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision.

The affiant's assertion that Rowe is a "known drug user" and "is presently known to be active in the drug scene" is indistinguishable from the allegations held to be bald and unilluminating assertions of suspicion entitled to no weight in *Spinelli.*

The Court below had adhered to this view in *Guzewicz* v. *Commonwealth,* 212 Va. 730, 187 S.E.2d 144 (1972) at 187 S.E.2d 145. In that case the Court held

that the conclusion of the affiant that the premises to be searched were "frequented by persons known to him to be unlawful users of controlled drugs" was not to be considered in determining probable cause. In *Guzewicz,* the Virginia Supreme Court stated that it doubted the validity of the aspect of *Spinelli* above cited in view of *Harris,* but continued to adhere to *Spinelli* pending further clarification by this Court. In this case the Virginia Supreme Court has stopped waiting for clarification and has abandoned its adherence to *Spinelli.* It is relying upon *Harris* in giving weight to the above quoted statement regarding Rowe's alleged drug activities.

The Virginia Supreme Court change in position is based on the following language in *Harris* at 403 U.S. 583:

> We cannot conclude that the policemen's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a "legal technician" as Mr. Justice Frankfurter is not a "practical consideration of every day life" upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic or experience and we decline to apply it to preclude the magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation.

This language, if a properly applicable precedent, would clearly support the decision of the Court below to give weight to the affiant officers allegation of criminal reputation. The language is in direct conflict with the above cited holding of *Spinelli.* The *Spinelli* decision was delivered by the majority of the members of

this Court. The portion of the *Harris* opinion herein involved was contained in Part II of the Court's opinion which was only the expressed views of three members of the Court. *Spinelli* is still the controlling precedent regarding the propriety of giving weight to "criminal reputation" allegations in a search warrant affidavit. The Court below erred in giving weight to such allegations in the present case because a minority opinion cannot overrule a majority holding of the Court. See, *Alaska* v. *Troy,* 258 U.S. 101, 67 L.Ed. 487, 42 S.Ct. 241 (1922).

A number of courts appear to have wrongfully considered *Harris* a binding precedent. See, *U.S.* v. *Crawford,* 462 F.2d 597 (9th Cir. 1972); *U.S.* v. *Marshall,* 526 F. 2d 1349 (9th Cir. 1975). Some cases allow the use of reputation allegations citing *Harris* as precedent, but limit the use of the information to determining whether the affidavit meets the second part of the *Aguilar-Spinelli* test in regard to the reliability of the informant. See, *U.S.* v. *Washington,* 550 F. 2d 326 (5th Cir. 1977)

In the present case, the criminal reputation allegation was used by the Court below to bolster the affidavit to meet the first part of the *Aguilar-Spinelli* test, which is the key issue, as discussed in Section A, supra. The use of the allegations for this purpose is in direct conflict with the purpose of the first part of the *Aguilar-Spinelli* test. In no way does it aid the magistrate's inquiry as to how the informant obtained his information.

In *U.S.* v. *Karathanos,* 531 U.S. 26 (2d Cir. 1976), *cert. den.* 96 S.Ct. 3221, the court held the affidavit was not sufficient and at pages 31 to 32 of the opinion

stated that a "recital of past criminal conduct" could not serve as an acceptable substitute for probable cause standards that have not been met. It held that criminal reputation evidence could not be utilized to conform to the first part of the *Aguilar-Spinelli* test and that *Harris* had not held it could be so utilized. The Second Circuit viewed it illogical to utilize such information to determine whether the source of an informant's information is such as to render it credible. The result in *Karathanos* is directly contrary to that of the Court below in result and reasoning.

The position of the Second Circuit in this regard is clearly more logical that that of the Supreme Court of Virginia in the present case. What possible probative value does Joseph Rowe's conviction in 1973 of selling marijuana give to the informant's assertion that in April of 1976, Mr. Pierceall has drugs in his residence at a location other than where he is meeting Mr. Rowe? It is especially ridiculous in view of the fact that there are no allegations that any suspicious conduct occurred at their meeting which took place in a public restaurant. It is also important to note that the reputation, concerning which the allegations are being made, is not that of the person who allegedly possessed the drugs. Nor do they relate to the alleged location of the drugs. Giving weight to such allegations of suspicion would lead to the issuance of the warrant solely at the discretion of any police officer who wants one. The holding of *Spinelli* v. *U.S.*, supra, should be adhered to and the view set forth in Part II of the opinion of the *United States* v. *Harris,* supra, rejected.

The Court should grant Certiorari to resolve the conflict between *Harris* and *Spinelli.* The Court should grant Certiorari to clear up the confusion created by

the conflict between these two cases. The Court should grant Certiorari to resolve the conflict between *Karathanos,* supra, and the present case. The Court should grant Certiorari to resolve the confusion between *Guzewicz,* supra, and the present case.

Upon the grant of a Writ of Certiorari the Court should hold the allegations set forth above should not have been considered by the Virginia Supreme Court.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Virginia should be granted for the reasons set forth above.

T. Brooke Howard, Esquire
Jack S. Rhoades, Esquire
Howard, Stevens, Lynch, Cake & Howard, P.C.
128 North Pitt Street
Alexandria, Virginia 22314

Counsel for Petitioner

APPENDIX

INDEX TO APPENDIX

TRANSCRIPT OF TRIAL COURT'S RULING ON MOTION TO SUPPRESS

[13] Stovall on the grounds that the affiant received information from somebody that was based on information received from somebody rather than a direct statement of the affiant simply does not accord with what appears in the affidavit. The affiant in the affidavit is not the informant. The affiant in the affidavit is Investigator Bennett, and he relays the information in the affidavit in the same manner that the affiant in Stovall relayed the information from Detective Luzi that a large quantity of Marijuana was stored on the premises of his home in Arlington County which is also the same date the warrant was issued in that case. So, the circumstances are entirely the same. The Commonwealth is trying to update a stale affidavit with exactly the same information that the Court held was insufficient in Stovall.

THE COURT: All right. I will take a ten minute recess.

(Whereupon, a short recess was taken.)

THE COURT: On your motion to suppress, after reading your memorandum and the Stovall case, hearing your arguments, it is my conclusion that under the rule of Stovall, the factual allegations and the affidavit covering early April, 1976, relating to the White Crosses, plus the information that the Defendant is selling White Crosses, plus the information received [14] in the past 24 hours constitutes sufficient factual allegations which, when added to the earlier information, are sufficient to establish probable cause. Your motion is denied.

You want to make an opening statement, Mr. Ebert.

MR. EBERT: Very briefly, Your Honor. I think the evidence will disclose that in this case, the officer went to the home of the Defendant and that he was present at the time. Pursuant to the search warrant, they did in fact search the premises; that they did find a quantity of illegal narcotic

drugs, and that they also found a number of drug implements, such as scales and items which were used to package and customarily used to manufacture for narcotic substances.

THE COURT: Mr. Howard?

MR. HOWARD: Your Honor, I just this we want to ask that the witnesses be excluded.

THE COURT: All right. All who are going to testify, come forward and be sworn.

THE CLERK: Raise your right hands, please.

(The prospective witnesses then in Court were sworn.)

THE COURT: All right. Go with the Sheriff. Don't discuss your testimony.

(Witnesses excluded.)

MR. EBERT: Your Honor, there is one witness who was

ORDER OF SUPREME COURT OF VIRGINIA GRANTING WRIT OF ERROR

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday *the* 11th *day of* October, 1977.

WILLIAM LOUIS PIERCEALL, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Record No. 770705

From the Circuit Court of Prince William County

Upon the petition of William Louis Pierceall, sometimes known as William L. Pierceall, a writ of error is awarded him to judgments rendered by the Circuit Court of Prince William County on the 27th day of January, 1977, in prosecutions by the Commonwealth against the said petitioner for felonies (Indictments Nos. 6481 through 6484).

This writ of error, however, is limited to the consideration of assignment of error No. I as follows:

> I. The court erred in denying the defendant's motion to suppress the fruits of the search conducted on April 19, 1976, because the warrant authorizing said search was issued without probable cause.

On further consideration whereof, it is ordered that the parts of the record to be printed on reproduced in the appendix are to be limited to those parts of the record germane to assignment of error No. I, and the briefs to be filed shall be limited to such discussion as is relevant to the assignment of error upon which this writ of error is awarded.

The petition for writ of error is refused as to assignment of error No. II.

A Copy
Teste:
/s/ ILLEGIBLE
Clerk

ORDER OF SUPREME COURT OF VIRGINIA AFFIRMING CONVICTION

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 21st *day of* April, 1978.

WILLIAM LOUIS PIERCEALL, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Record No. 770705

Upon a writ of error to judgments rendered by the Circuit Court of Prince William County on the 27th day of January, 1977.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the judgments aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgments complained of. It is therefore adjudged and ordered that the said judgments be affirmed, and that the plaintiff in error pay to the Commonwealth thirty dollars damages, and also the costs expended about her defense herein.

Which is ordered to be forthwith certified to the said circuit court.

A Copy,
Teste:
/s/ ALLAN L. LUCY
Clerk

Defendant in error's cost:

Attorney's fee	$50.00
Printing brief	58.80
	$108.80

Teste:
/s/ ALLAN L. LUCY
Clerk
/s/ MR. BEECH

OPINION OF VIRGINIA SUPREME COURT PURSUANT TO ORDER AFFIRMING CONVICTION

Present: I'Anson, C.J., Carrico, Harrison, Cochran, Harman, and Compton, JJ.

WILLIAM LOUIS PIERCEALL

—v—

COMMONWEALTH OF VIRGINIA

Record No. 770705

FROM THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

James Keith, Judge

OPINION BY JUSTICE GEORGE M. COCHRAN

April 21, 1978

Defendant, William Louis Pierceall, was convicted by the trial court, sitting without a jury, of manufacturing or producing marijuana, possession of amphetamine with intent to distribute, possession of marijuana with intent to distribute, and possession of cocaine. For each of the four convictions, defendant was sentenced to fifteen years in the penitentiary with ten years suspended, conditioned upon his good behavior. The sentences were ordered to run concurrently.

Defendant was arrested on the night of April 19, 1976, by police conducting a search of his home in Woodbridge. During the search, police seized certain controlled substances and alleged drug paraphernalia. The search warrant had been issued earlier that day by a magistrate based upon an affidavit sworn to by Officer Bennett of the Prince William County Police Department.

Before the trial, defendant moved to suppress all the fruits of the search. Denying the motion, and admitting the evidence, the trial court commented that

> "the factual allegations and the affidavit covering early April, 1976 relating to the White Crosses, plus the information that the Defendant is selling White Crosses, plus the information received in the past 24 hours constitutes sufficient factual allegations which, when added to the earlier information, are sufficient to establish probable cause."

The affidavit, upon which the search warrant was issued, is set out in the margin.*

---

* "During the fall of 1972, I received unconfirmed information from various informants regarding one WILLIAM PIERCEALL who was and is the owner/operator of the Dale City Sunoco (service station) at 3125 Davis Ford Road, Woodbridge, Virginia. The information given me was that PIERCEALL was trafficking in marijuana and other drugs. That is to say that PIERCEALL buys illicit controlled substances, marijuana and other drugs, for a price and then re-sells the material at a substantial profit. This information could not be confirmed at that time.

"On July 23, 1973, Investigator C. T. Deane, also of the Prince William County police department, told me that on July 19, 1973, he had arrested two persons, MICHAEL STEVEN JENKINS and ROGER ALLEN HURT, charging them with a burglary of the Dale City Sunoco Service Station (owned by subject PIERCEALL) on July 12, 1973. Investigator Deane told me that both had confessed to this crime after having been advised of their rights, and that MICHAEL STEVEN JENKINS told him that during the time that he (JENKINS) had seen a case placed in the office area of the station by PIERCEALL which contained two (2) wrapped kilos (1 Kilo = 2.2 lbs.) of marijuana. JENKINS told Investigator Deans that PIERCEALL had left the bag at the station that night and had telephoned him (JENKINS) to see if it was still there. JENKINS indicated that he was a user of marijuana and therefore could recognize same.

"Investigator Deans told me that subject ROGER ALLEN HURT had been interviewed separately from subject JENKINS and that HURT stated that he also had seen the two kilos of marijuana which had allegedly belonged to PIERCEALL. At that time HURT was also an employee of WILLIAM PIERCEALL at the Dale City Sunoco Service Station.

Defendant contends that the affidavit does not contain sufficient underlying facts to establish probable cause under the test required by *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969).

"Investigator Deans also told me, that JENKINS had told him that one WILLIAM 'BILLY' WOOTEN at the Dale City Sunoco service station was 'selling marijuana for PIERCEALL'. WILLIAM 'BILLY' WOOTEN is personally known to this investigator. He has the general reputation of a drug user and dealer in various drugs and marijuana.

"On July 25, 1973, Officer W. P. Metheny of the Prince William County Police Department who at that time was working undercover, purchased a quantity of cocaine from KIPPY EUGENE ROGERS, an employee of WILLIAM LOUIS PIERCEALL at the Dale City Sunoco Service Station. On July 31, 1973, Officer Metheny purchased a quantity of methamphethamine [sic] from subject ROGERS. Both these sales took place in a house approximately 75 yards from the Dale City Sunoco Service Station, which was rented by ROGERS and others. ROGERS was subsequently arrested, tried and convicted on these two felonies. Another resident of the house occupied by KIPPY EUGENE ROGERS during this period of time was ROGER ALLEN HURT. Both ROGERS and HURT were employed by PIERCEALL at the Dale City Sunoco Service Station.

"I have learned that on August 29, 1973, WILLIAM LOUIS PIERCEALL was arrested in Toronto, Ontario, Canada in the company of KIPPY EUGENE ROGERS and two other men all of whom were charged with possession of restricted weapons (three (3) loaded handguns), possession of narcotics (cocaine) and conspiracy. Investigators of the Metropolitan Toronto Police questioned these men and learned that PIERCEALL was involved in an unknown business transaction with a man named ARTHUR ISRAEL and that ISRAEL had absconded with $3,000.00. PIERCEALL had gone to Toronto on August 26, 1973 and located ISRAEL in that city. PIERCEALL then returned to Virginia where he hired KIPPY EUGENE ROGERS and two (2) other men to return to Toronto, find ISRAEL and 'work him over' until he returned the $3,000.00. ROGERS and the other men were to be paid $200.00 each for their services. The Metropolitan Toronto Police Department believed that the four men actually planned to murder subject ISRAEL and further believed that the $3,000.00 ISRAEL absconded with was a drug 'rip-off'.

Before a magistrate is justified in issuing a search warrant, he must be satisfied that probable cause to search exists at the time the warrant issues. *Sgro* v. *United States*, 287 U.S. 206, 210-11 (1932); *Stovall* v. *Commonwealth*, 213 Va. 67, 189 S.E.2d 353 (1972). Thus, circumstances occur-

---

"It may be noted that WILLIAM LOUIS PIERCEALL, aka: 'BILL' PIERCEALL has been seen often in the company of known and suspected drug users and dealers in this community. A goodly portion of his associates are active in the illicit drug scene, and several have lived at PIERCEALL's house at 13401 Kingsman Road, Woodbridge, Virginia, Prince William County for various lengths of time.

"In November 1975, I developed an informant who gave me additional information concerning WILLIAM LOUIS PIERCEALL. This informant desires to remain anonymous as he fears for his safety should his identity be made known. The informant stated that PIERCEALL 'had a gun and would use it' on him (the informant).

"The informant agreed to make a 'controlled buy' of marijuana from 'BILL' PIERCEALL at PIERCEALL's house located at 13401 Kingsman Road, Woodbridge, Virginia on or about November 15, 1975.

"I met the informant at a pre-designated location at approximately 5:15 p.m. At this time I searched the informant and his/her car and thus assured myself that there was no marijuana or other controlled substances present. In addition, I removed the informant's personal money. I then furnished the informant $35.00.

"At 5:30 p.m. the informant departed enroute to 13401 Kingsman Road (BILL PIERCEALL's house), and I followed in my car, observing the informant.

"I observed the informant arrive and enter 13401 Kingsman Road at 5:44 p.m.

"At 6:01 p.m. the informant was seen to exit 13401 Kingsman Road.

"I then followed the informant back to a predesignated meeting place where the informant turned over a plastic bag of marijuana to me which the informant stated had been purchased from 'BILL' PIERCEALL for $35.00. Subsequent chemical analysis of the material purchased on this date conducted by a chemist at the

ring substantially before the issuance of a search warrant can justify the issuance of the warrant only if such past circumstances disclose "a probable cause" of continuous nature so as to support a rational conclusion that the past probable cause is still operative at the time of the issuance of the warrant. *Sgro* v. *United States, supra.*

Bureau of Forensic Science (State laboratory) revealed the material to be in fact, marijuana.

"The informant also stated that approximately one (1) pound of marijuana was then within PIERCEALL'S house, along with 'at least 50 marijuana plants' which were being grown by BILL PIERCEALL in one bedroom in the lower portion of the house (13401 Kingsman Road, Woodbridge, Virginia).

"In early April 1976, I received additional information from the informant regarding WILLIAM LOUIS 'BILL' PIERCEALL to the effect that PIERCEALL had recently been 'getting some white crosses in'. NOTE: White Cross is a jargon term on [sic] the drug culture which refers to a type of small white pill of amphetamine and/or methamphetamine which has a scored mark in the shape of a cross on [sic] X on one side. They are also called 'cartwheels' and 'speed'. 'Speed' refers to any preparation of a stimulent [sic] nature.

"I base my knowledge of current drug terms, prices, appearance, etc., on the following facts:

"I am now and have been a full time narcotics enforcement officer with four (4) years experience exclusively in narcotics enforcement and a total of 13 years in law enforcement. I have received specialized training in narcotics enforcement through the U.S. Department of Justice, Bureau of Narcotics and Dangerous Drugs. I am a member in good standing of the International Association of Narcotics Enforcement Officer's and have read various books, etc., on the subject as well as having completed a number of college level classes related to special enforcement.

"I also maintain an informant system which allows me continuing contact with the street terms, prices, etc., of various drugs and controlled substances.

"I have received information regarding WILLIAM LOUIS PIERCEALL which leads me to believe that he is presently selling quantities of 'white crosses'.

In *Stovall,* we held that while time alone is not controlling, evidence that a person possessed an illegal drug 72 days prior to the issuance of a search warrant was insufficient by itself to establish probable cause. However, an affidavit containing this type of stale information can be used to establish probable cause if it also contains additional facts showing that the evidence of criminal conduct could still be found at the place to be searched. 213 Va. at 70-71, 189 S.E.2d at 356.

"Within the past 24 hour period, I have received information from the informant as follows: The informant told me that William 'Bill' Pierceall presently has a large number of 'white crosses' at his home at 13401 Kingsman Rd., Woodbridge, Va. as well as a quantity of marijuana, marijuana smoking pipes and other related paraphernalia of drug use. I believe the information received from this person to be reliable, as the informant has provided me with information on several occasions in the past which independent investigation has proven to be true and correct. For example, the informant on one occasion told me that a certain person was dealing in a particular type of drug at a given point in time. I had, through prior investigation, determined that this information was correct, unbeknownst to the informant. The informant has provided this type of information on several occasions. In addition, I am forther [sic] inclined to believe the informant due to the 'controlled buy' situation in November 1975.

"On the evening of April 19, 1976 I observed William 'Bill' Pierceall in the company of one Joseph Rowe at the Hardee's restaurant in the Glendale Shopping Center Woodbridge, Va. Joseph Rowe is a known drug user and is a convicted felon having been convicted in 1973 of 2 counts of sale of marijuana to Inv. D. L. Cahill of the Prince William County Police. He is presently known to be active in the drug scene.

"I therefore believe that based on the information provided by the informant and the fact that I personally seen [sic] William 'Bill' Pierceall in the company of a known Drug dealer within the past 24 hours, that there is now concealed within the premises of 13401 Kingsman Rd. Woodbridge, Va. Prince William County, a quantity of contraband controlled substances possessed in violation of existing law."

The affidavit in the instant case contains information about defendant's alleged criminal conduct during 1972, 1973, and on or about November 15, 1975.[1] The interval between these events and April 19, 1976, when the warrant was issued, is considerably longer than the interval in *Stovall*. This information, standing alone, is not sufficient to support a finding of probable cause on the date the warrant was issued.

We must, therefore, consider whether the remaining portion of the affidavit states additional facts from which the magistrate could rationally conclude that defendant's alleged criminal activity continued until April 19, 1976, when the warrant issued.

The only matters in the affidavit dealing with events subsequent to the November 1975 "controlled buy" can be summarized as follows:

> (1) In early April 1976, the affiant received information from the anonymous informant that Pierceall had recently been "getting some white crosses [a controlled drug] in;"
>
> (2) Information received by the affiant leads him to believe that Pierceall is presently selling quantities of "white crosses;"
>
> (3) Within the past 24 hour period, the informant told the affiant that Pierceall "presently has a large number of 'white crosses' at this home . . . as well as a quantity of marijuana, marijuana smoking pipes and other related paraphernalia of drug use;"
>
> (4) The informant had furnished the affiant information of illegal drug activity in the past which the affiant found to be correct as a result of an independent investigation, and that affiant believed the informant,

[1] We believe that the allegations concerning the November 1975 occurrence would have supported a finding of probable cause had the search warrant issued then.

> "due to the 'controlled buy' situation in November 1975, was credible and his information reliable;" and
>
> (5) Affiant's statement that defendant has been seen often in the company of known and suspected drug users and dealers; and that on the night of April 19, 1976, defendant was seen at a restaurant in the company of a convicted drug dealer.

An affidavit for a search warrant based upon information from an informant must describe (1) some of the underlying circumstances necessary to enable a neutral and detached magistrate to judge the validity of the informant's conclusion that the evidence sought was where he claimed it was; and (2) the underlying circumstances from which the magistrate can determine that the affiant's unnamed informant was credible or his information reliable. *Spinelli* v. *United States, supra; Aguilar* v. *Texas, supra; Guzewicz* v. *Commonwealth*, 212 Va. 730, 732, 187 S.E.2d 144, 146 (1972).

The dispositive question is whether the affidavit met the first requirement of the two-pronged *Aguilar-Spinelli* test,[2] *i.e.*, whether it described some of the underlying circumstances necessary to enable the magistrate to judge the validity of the informant's conclusion that the narcotics were in Pierceall's home.

A determination whether probable cause exists for the issuance of a search warrant should be "based upon a common-sense reading of the entire affidavit." *Spinelli* v. *United States, supra,* 393 U.S. at 415; *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965). *See Huff* v. *Commonwealth,* 213 Va. 710, 717, 194 S.E.2d 690, 696 (1973). In *Spinelli,* the Supreme Court indicated that a tip, which by itself does not establish probable cause, may properly be

[2] Defendant does not contend that the second prong of the *Aguilar-Spinelli* test was not met.

considered by a magistrate, and other portions of the affidavit may support the tip so as to "permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." 393 U.S. at 418. Upon a fair reading of the entire affidavit in the present case, we hold that probable cause was established.

The informant made the controlled buy of marijuana on November 15, 1975, in Pierceall's residence. He reported to the affiant-officer immediately after the transaction that there was approximately a pound of marijuana in the house and that "at least 50 marijuana plants" were being grown by Pierceall in a bedroom in the lower portion of the dwelling. It is apparent, from the informant's prompt admittance to the residence, his speedy consummation of the purchase, and his report to the affiant, that he enjoyed the confidence of Pierceall, was a marijuana customer of his, and was familiar with at least a part of the interior of the residence. Moreover, the supervised growth of many marijuana plants by Pierceall indicated a continuing enterprise in the production and distribution of marijuana rather than occasional or isolated incidents.

The affiant stated that on April 19, 1976, the date on which the search warrant was issued, he observed Pierceall in the company of Joseph Rowe, a known drug user who had been convicted in 1973 of two counts of selling marijuana and who "is presently known to be active in the drug scene." Defendant maintains that the reference to Rowe's present activities is a conclusory statement which, under *Guzewicz* v. *Commonwealth*, 212 Va. 730, 187 S.E.2d 144 (1972), must be disregarded. In *Guzewicz*, the affidavit included a statement that the affiant, a police officer, had personal knowledge that the premises to be searched were "frequented by persons known to him to be unlawful users of controlled drugs." Relying on *Spinelli, supra*, 393 U.S. at 418-19, we accorded no probative value to the conclusory statement. We acknowledged doubt, however, in light of the diverse views expressed in *United States* v. *Harris*,

403 U.S. 573 (1971), as to the continuing validity of this aspect of *Spinelli*. Although *Spinelli* has not been further clarified in this regard, we believe that probative value may be accorded the officer's statement that he had observed Pierceall, on the very day that application for the warrant was made, in the company of a man known to the affiant as a drug dealer, where the statement was supported by the fact that Rowe had previously been convicted of two counts of selling marijuana. Additional information in the affidavit also established a pattern of association by Pierceall with other convicted drug traffickers over a period of years.

As in *Huff, supra*, the investigation of the accused in the present case had extended over a long period of time. Pierceall had been identified with the drug traffic and with known and suspected drug users and distributors since 1972. Some of the inculpatory information comprised no more than unconfirmed rumors, but some was detailed information received from police officers and from employees of Pierceall.

In *Huff*, we held that the "comonsense conclusion" to be drawn from facts establishing a pattern of criminal practice by the accused was that the pattern probably was continuing at the time of the affidavit, that it would probably continue until the warrant was executed, and that drugs would probably be found at that time at Huff's residence. 213 Va. at 717, 194 S.E.2d at 696. Here, there was an affirmative, unequivocal representation by a reliable informant within 24 hours of the execution of the affidavit that the pattern of criminal conduct was continuing.

The present affidavit is distinguishable from the one found insufficient in *Stovall*. There, the affidavit contained information as to possession of controlled drugs during the period August 21 to September 9. The affidavit further stated that the affiant, a police officer, had received information from another named police officer on November 20,

the date the search warrant was issued, that the suspect "has a large quantity of marijuana" in his residence. We held that the information as to possession of drugs in August and September was too stale, and that the current information consisted of a mere conclusiory statement without supporting facts.

In the present case, however, the tip in early April and the last tip received shortly before issuance of the warrant on April 19, 1976, were furnished by the same person who five months previously had entered defendant's residence, made the controlled buy, and observed a pound of marijuana and the growing marijuana plants. We believe it is reasonable to infer that the informant's last tip, unlike the officer's unsupported conclusory statement in *Stovall,* was based upon personal observation. We conclude that the affidavit, taken as a whole, states sufficient underlying circumstances to support the magistrate's finding of probable cause. *See Manley* v. *Commonwealth,* 211 Va. 146, 176 S.E. 2d 309 (1970), *cert. denied,* 403 U.S. 936 (1971), where we upheld an affidavit based upon the personal observation of the informant, who also stated, against his penal interest, that he had been participating with the suspect in the illegal use of drugs.

For the reasons stated, the judgment of the trial court will be

Affirmed.

ORDER OF VIRGINIA SUPREME COURT DENYING REHEARING

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 9th *day of* June, 1978.

WILLIAM LOUIS PIERCEALL, *Plaintiff in error,*
against
COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Record No. 770705

Upon a Petition for Rehearing

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 21st day of April, 1978, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ ALLEN L. LUCY
Clerk

ORDER OF VIRGINIA SUPREME COURT STAYING EXECUTION OF SENTENCE

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday, *the* 14th *day of* June, 1978.

WILLIAM LOUIS PIERCEALL, *Plaintiff in error,*

against

COMMONWEALTH OF VIRGINIA, *Defendant in error.*

Record No. 770705

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the plaintiff in error, by counsel, praying for a stay of execution of the judgment rendered herein on April 21, 1978, in order that he may have reasonable time and opportunity to present to the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this court, it is now ordered that the execution and enforcement of the judgment of this court in the above-styled case rendered on April 21, 1978, be, and the same is hereby, stayed, to and including the 7th day of September, 1978, on the expiration of which time the same may be enforced, unless the case has been before that time docketed in the Supreme Court of the United States, in which event enforcement thereof shall be stayed until the final determination of the case by that court.

The above stay, however, is not to discharge the petitioner from custody, if in custody, or to release his bond if out on bail.

A Copy,

Teste:

/s/ ALLEN L. LUCY
Clerk

In The

Supreme Court of the United States

October Term, 1978

No. 78-393

WILLIAM LOUIS PIERCEALL,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

MARSHALL COLEMAN
Attorney General of Virginia

ROBERT H. HERRING, JR.
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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No. 78-393

WILLIAM LOUIS PIERCEALL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at ....., Va. ....., 243 S.E.2d 222 (1978) and is set forth in petitioner's Appendix at 6a-16a.

JURISDICTION

Petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

Petitioner claims the following issues are presented by the case.

I. Were The Fruits Of The Search Conducted On April 19, 1976, Seized Pursuant To A Warrant Issued Without Probable Cause And Admitted Into Evidence Contrary To The Fourth And Fourteenth Amendments?

A. Does the informant's tip upon which probable cause purports to rest conform to the *Aguilar-Spinelli* test?

B. Has the conflict between *Harris* v. *United States* and *Spinelli* v. *United States* as to the use of criminal reputation allegations created confusion and conflict in state and lower federal courts and did the court below properly give weight to such allegations?

STATEMENT OF THE CASE

On July 8, 1976, the Honorable James Keith, of the Circuit Court of Prince William County, Virginia, sitting alone, overruled William L. Pierceall's Motion to Suppress certain evidence seized during the search of Mr. Pierceall's home on April 19, 1976. Mr. Pierceall was convicted of the manufacture or production of marijuana, the possession of amphetamine with intent to distribute, the possession of marijuana with intent to distribute, and the possession of cocaine as charged in three indictments. A fourth indictment was dismissed. (Appendix, Supreme Court of Virginia, at 1-5, 24-25, 36-38).

On January 13, 1977, the Court denied Mr. Pierceall's motion for new trial, made on January 11, 1977. (Appendix 34-35).

On January 27, 1977, Mr. Pierceall was sentenced to fifteen years confinement in the State Penitentiary, with ten years suspended, on each indictment, the sentences to run concurrently. Final judgment orders were entered on that date. (Appendix 36-47). An appeal to the Supreme Court of Virginia was duly noted and on October 11, 1977, that court

granted a writ of error limited to the question of the sufficiency of the affidavit offered in support of the search warrant. On April 21, 1978, the Supreme Court of Virginia affirmed the judgment of the Circuit Court of Prince William County in a written opinion. On June 9, 1978, the Supreme Court of Virginia denied Mr. Pierceall's petition for rehearing. The order granting the writ of error, the opinion of the Supreme Court of Virginia, and the order of that court denying the petition for rehearing are set forth in the Appendix to the Petition for Writ of Certiorari at 3a, 6a-16a, and 17a, hereinafter (P.App. at .....).

STATEMENT OF FACTS

On April 19, 1976, certain law-enforcement officers of Prince William County executed a search warrant at 13401 Kingsman Road, Woodbridge, Prince William County, Virginia. The petitioner was arrested on the premises and certain items were seized which resulted in the charges and convictions noted above.

The basis for the warrant was a sworn affidavit of investigator R. L. Bennett, which is set forth in full in the Petition for Writ of Certiorari at 4-10.

ARGUMENT AGAINST THE GRANTING OF WRIT OF CERTIORARI

I.

The Affidavit Submitted In Application For A Search Warrant Met The Test Set Forth In Aguilar v. Texas, 378 U.S. 108 (1964) and Spinelli v. United States, 393 U.S. 410 (1969).

The petitioner admits that the Supreme Court of Virginia properly considered the search warrant on the common sense reading of the affidavit. See *United States* v. *Ventresca,*

380 U.S. 102 (1965). The complaint is not founded in that court's consideration, but, rather only in the result.

The petitioner does not dispute that the affidavit clearly contains information sufficient to permit the magistrate to judge the informant's credibility, the second part of the *Aguilar-Spinelli* test. Rather, he attacks the warrant upon an alleged insufficiency of " 'some of the underlying circumstances necessary to enable the magistrate to judge the validity of the informant's conclusion that the narcotics were in [his] home.' " (Petition for writ of certiorari at 13). The specific defect alleged is that the affidavit does not indicate that the last tip, given within the twenty-four hour period preceding the warrant's issuance and execution, was the product of the informant's personal observation. The Virginia Supreme Court, however, noted that the informant had made a controlled buy of marijuana at Pierceall's residence on November 15, 1975, and afterward reported to the affiant that "approximately a pound of marijuana was in the house and that 'at least fifty marijuana plants' were being grown by Pierceall in a bedroom." (P.App. at 14a). The court further noted that the affidavit related a long investigation into the case, including detailed reports from fellow officers and from Pierceall's employees. (P. App. at 15a). Recognizing that some of the information consisted of unconfirmed rumors, the court found that, standing alone, the allegation of November 15, 1975 was insufficient to support probable cause on April 19, 1976. (P. App. at 15a, 12a). The significance of the earlier information, however, was that a pattern of criminal activity by the petitioner was shown. Noting from an earlier opinion, the court found that the " 'common sense conclusion' to be drawn . . . was that the pattern probably was continuing at the time of the affidavit, that it would probably continue until the warrant

was executed, and that the drugs would probably be found at that time." *Huff* v. *Commonwealth,* 213 Va. 710, 717, 194 S.E.2d 690, 696 (1973) (P.App. at 15a). This conclusion is certainly buttressed by the firm representation made by the reliable and unchallenged informant that within the preceding twenty-four hours certain specific items of contraband were in petitioner's home. The court concluded that, as this tip was given by the same individual who participated in the controlled buy, it was reasonable to infer that it was based upon personal observation. It is most significant that at no point has petitioner attacked the *Huff* rationale.

As noted above, this Court has recognized that a determination of probable cause should be based upon a "common sense reading of the entire affidavit." *Spinelli* v. *United States,* 393 U.S. at 415; *United States* v. *Ventresca,* 380 U.S. at 108. Petitioner attempts to rebut the state supreme court's reading of the affidavit by reference to *United States* v. *Karathanos,* 531 F.2d 26 (2nd Cir.), *cert. denied,* 428 U.S. 910 (1976). That case involved a prosecution under 8 U.S.C. § 1324 for harboring illegal aliens. The affidavit was in part the product of statements made by an informant who was himself an alien and who lived in close quarters with the alleged illegal aliens in the defendant's restaurant. That court noted, however, that the informant had no way of knowing whether the persons so described were in fact illegally in this country. The court went on to discuss the differences in language between the different aliens and the natural disinclination to admit such a status, both of which would enhance the probability that the informant's statements were mere speculation. The court further noted that the affidavit was void of any names or nationalities of the persons allegedly harbored. The court

concluded that the source's statements could just as well be conclusions, stating "The fact that the co-workers were boarded in the basement [of the defendant's restaurant] is not inconsistent with traditional employers' past treatment of low-paid lawfully admitted immigrants." 531 F.2d at 30-31. The crime was not in harboring aliens, only those illegally in this country. Without any corroboration the magistrate would have to assume that the persons referred to by the affiant in *Karathanos* were within that status contemplated by the statute. As the criminality of the act itself had to be inferred, without support from the rest of the affidavit, the conviction was reversed. In the instant case, the criminality of petitioner's acts need not be presumed as the substances described obviously constituted contraband.

The affidavit found insufficient in *Spinelli* merely recited observations of petitioner's movement between several apartment buildings and contained the claim that one such apartment frequented by Spinelli contained two telephones. Additionally, the representation was made that Spinelli was known to be a bookmaker, a gambler, and an associate of bookmakers and gamblers. The informant's tip merely stated that Spinelli was operating a bookmaking operation with the two telephones. This Court found "nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed." 393 U.S. at 418. As is readily apparent, the affidavit in the instant case clearly contains support for the magistrate's conclusion that Pierceall was engaged in criminal activity of the kind and place alleged in the affidavit.

II.

The Petitioner Has Failed To Demonstrate That Significant Conflict Exists Between Harris v. United States And Spinelli v. United States Or That The Virginia Supreme Court Improperly Considered Criminal Reputation In The Present Case.

In the instant case petitioner claims that the Virginia Supreme Court improperly considered an allegation of criminal reputation in evaluating the sufficiency of the affidavit. Petitioner specifically makes the allegation that "an individual with whom the defendant was seen on the date the warrant was issued was 'a known drug user and is presently known to be active in the drug scene' " was improperly considered. (Petition at 18). Petitioner asserts that such language is indistinguishable from that considered and rejected by this Court in *Spinelli.* As noted above, nothing in the *Spinelli* affidavit buttressed the informant's report that a crime was probably being committed. Without any such support, the allegation that Spinelli was "known" as a gambler and an associate of gamblers was properly dismissed as mere suspicion. In the instant case, however, the Virginia Supreme Court determined that "probative value may be accorded the officer's statement that he had observed Pierceall, on the very date that application for the warrant was made, in the company of a man known to the affiant as a drug dealer, where the statement *was supported by the fact that Rowe [the man] had previously been convicted of two counts of selling marijuana.*" (P. App. at 15a) (emphasis added). The critical distinction is obvious. While the affiant's suspicion in *Spinelli* was not supported by any evidence, the officer's allegation in the instant case is underscored by Rowe's conviction of two counts of selling marijuana.

Spinelli certainly has not been overruled by *United States* v. *Harris,* 403 U.S. 573, 580-583 (1971). The Virginia

Supreme Court recognized this fact, for nothing in the opinion from that court indicates that a consideration of Rowe's reputation was the controlling factor in the decision. Rather, the court gave the affiant's statement "probative value" only because it was supported by Rowe's previous conviction. *Guzewicz* v. *Commonwealth,* 212 Va. 730, 187 S.E.2d 144 (1972) can easily be distinguished in that the affiant merely claimed the premises to be searched were " 'frequented by persons known to him to be unlawful users of controlled drugs' " without corroboration. (P. App. at 14a). In the case at bar, the informant related that a substantial quantity of particularized drugs and related paraphernalia were present in petitioner's home within the twenty-four hour period prior to issuance of the warrant. The fact that petitioner is observed in the company of a convicted drug seller on the very date the warrant is executed clearly lends support to a fair reading of the affidavit that criminal conduct probably is continuing. Therefore, the *Spinelli* and *Guzewicz* situations are clearly distinguishable from the instant case.

As to petitioner's claim that certain courts have perceived part II of *Harris* to be binding, an examination of those cases cited reveals this claim to be without merit. In neither of these cases was *Harris* cited as controlling, nor did the disposition of the cases turn upon a question of criminal reputation. *United States* v. *Crawford,* 462 F.2d 597 (9th Cir. 1972) was a case in which the second prong of the *Aguilar-Spinelli* test was attacked. After sustaining the affidavit and affirming the conviction, the court, in dictum, noted that the affiant should have related more details of his contact with the informant which caused him to conclude reliability. *Harris* was cited almost in passing and clearly was not crucial to the outcome of the case. *United States* v. *Crawford,* 462 F.2d at 599. Similarly, in *United*

States v. *Marshall,* 526 F.2d 1349, 1356-1357 (9th Cir. 1975), the affidavit was corroborated by independent investigation. The reputation of the co-defendant's husband, who was on parole for a heroin violation, was considered, but not controlling. *See also United States* v. *Dauphinee,* 538 F.2d 1, 4 (1st Cir. 1976); *United States* v. *Kemp,* 421 F.Supp. 563, 566 (W.D. Pa. 1976). It is clear from an examination of these cases that *Harris* is not creating the confusion petitioner has alleged. The petitioner's reliance on *Karathanos* is misplaced, for the reasons stated above.

A careful reading of these decisions reveals that petitioner's claim of substantial conflict is unfounded.

CONCLUSION

For the foregoing reasons, the respondent respectfully submits that this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Herring, Jr., Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 24th day of November, 1978, I mailed with first-class postage prepaid a true copy of this Respondent's Brief in Opposition To Granting of Certiorari to T. Brook Howard, Esquire, and Jack S. Rhoades, Esquire, Howard, Stephens, Lynch, Cake and Howard, 128 North Pitt Street, Alexandria, Virginia 22314.

ROBERT H. HERRING, JR.
Assistant Attorney General